

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA, ) Case No. 3:04-cr-00010-ECR-VPC  
11 )  
12 Plaintiff, ) ORDER  
13 vs. )  
14 JERMAINE ALONZO MITCHELL, )  
15 Defendant. )  
16 \_\_\_\_\_

17 On January 24, 2011, Defendant filed a motion pursuant to 28 U.S.C. §  
18 2255 to vacate, set aside, or correct his sentence (#199). Pursuant to order of the  
19 Court, the Government has responded (#204) to the motion. Thereafter  
20 Defendant filed a traverse (#207) in support of the motion.

21 This motion is now ripe, and we consider and decide it.

22 While the Ninth Circuit decisions in United States v. Hollis, 490 F.3d 1149  
23 (9<sup>th</sup> Cir. 2007) and United States v. Shaw, 936 F.2d 412 (9<sup>th</sup> Cir. 1991), as plead  
24 by the Government, provide a valid basis for denial of Defendant's motion, a  
25 recent United States Supreme Court decision, DePierre v. United States, 564 U.S.  
26 \_\_\_\_ (decided June 9, 2011), forecloses granting of Defendant's motion and it  
27 must therefore be denied.

28 The case at bar and DePierre, *id.*, are very similar. In both cases, the

1 indictment, jury instructions, and jury verdict made references to cocaine base  
2 and not to crack cocaine. In both cases, defendant was sentenced on the basis of  
3 an offense involving 50 grams or more of a mixture or substance which contains  
4 cocaine base.

5 The Supreme Court in DePierre, id., decided that, in interpreting the statute  
6 21 U.S.C. § 841(b)(1)(A)(iii), the term cocaine base refers to cocaine in its basic  
7 form rather than exclusively to what is known as crack cocaine. The leaves of  
8 the coca plant can be processed to produce a paste-like substance. If the coca  
9 paste is dissolved in water and hydrochloric acid, which is a base, it becomes  
10 cocaine hydrochloride, a white powdery substance which is not a base. It is  
11 ingested by snorting or diluted with water and injected. It is generally not  
12 smoked.

13 Cocaine hydrochloride can be converted into a cocaine base by combining  
14 the powder cocaine with water and a base such as baking soda. The chemical  
15 reaction changes the cocaine hydrochloride into a chemically basic cocaine  
16 molecule. The resulting solid substance can be cooled and broken into small  
17 pieces and then smoked. This substance is known as crack or rock cocaine.  
18 Alternatively, powder cocaine can be dissolved in water and ammonia, and with  
19 the addition of ether (also a base) a solid substance known as freebase, separates  
20 from the solution and can be smoked. Crack and freebase like coca paste have  
21 the same chemical composition:  $C_{17}H_{21}NO_4$ . There is no chemical difference  
22 between coca paste, crack cocaine, and freebase, and they are all generally  
23 ingested by smoking.

24 In 1986, Congress substantially increased the penalties for offenses  
25 involving cocaine base, as contrasted with powder cocaine. Anti-Drug Abuse  
26 Act of 1986 (ADAA), 100 Stat. 3207. This was the statute in effect at the time of  
27 both DePierre, id., and the case at bar. While Congress was most concerned  
28 with crack as the moving force for ADAA, the statute providing for the increased

1 penalties was written to encompass more than crack; it was written to encompass  
2 all forms of cocaine base. The Supreme Court finds in DePierre, id., that the  
3 statute should be read to include all forms of cocaine base, i.e.,  $C_{17}H_{21}NO_4$ , the  
4 molecule found in crack, freebase, and coca paste, the chemically basic form of  
5 cocaine. The statute reaches more broadly than to just crack cocaine. It reaches  
6 to all forms of cocaine base. Cocaine base is smoked which gives it a more  
7 intense and more addictive high than the ingestion of powder cocaine. This  
8 feature is not unique to crack cocaine, but freebase and coca paste are also  
9 acknowledged as dangerous smokeable forms of cocaine. The reach of the  
10 ADAA was beyond just crack.

11 The term cocaine base is not limited to crack cocaine. While the record  
12 indicates the case at bar was tried by both sides as a crack cocaine case, the  
13 burden of proof of the Government was not narrowed to proving crack cocaine  
14 was involved. The Government was only required to prove cocaine base was  
15 involved. In our case, the jury found that Defendant possessed with intent to  
16 distribute 50 grams or more of a mixture or substance containing cocaine base.  
17 This same terminology was used in the Indictment. This was an adequate basis  
18 for the more severe penalty imposed under the ADAA.

19 In the Guidelines adopted following the enactment of the ADAA, the  
20 Sentencing Commission defined cocaine base as meaning crack cocaine for the  
21 increased penalties. However, the Supreme Court in DePierre, id., is not  
22 persuaded that the statute should be so construed, or that the action of the  
23 Sentencing Commission is persuasive to the Court.

24 In DePierre, id., the Supreme Court upholds the judgment of conviction  
25 based on the indictment charging and the jury finding the offense involved  
26 cocaine base. This is the same scenario as we have in the case at bar.

27 There could be no valid claim of ineffective assistance of counsel made in  
28 this case because of failure of counsel to object that the Government had not

1 proven that the cocaine base involved in the case was crack. Ineffective  
2 assistance of counsel requires Defendant to show he was prejudiced by counsel's  
3 performance. There could be no such prejudice when it was unnecessary for the  
4 Government to prove the cocaine base involved was crack. It was only necessary  
5 for the Government to prove cocaine base was involved, which it did, and in fact  
6 proved crack was involved. Further, counsel's representation in failing to make  
7 such objection certainly did not fall below an objective standard of  
8 reasonableness.

9 As a second ground for his motion, Defendant claims ineffective assistance  
10 of counsel for his trial counsel's failure to challenge the juror identified by the  
11 Court of Appeals in the direct appeal as Juror Jane Doe.

12 Defendant's claim in this regard also fails. Defendant cannot show that he  
13 was prejudiced by counsel's performance in that respect, nor can he show that  
14 but for counsel's unprofessional errors the result of the proceeding would have  
15 been different. In the circumstances, these are difficult things to show in any  
16 event. The fact that Defendant was convicted is insufficient to make these  
17 showings. No evidence in the record indicates that the result of the case would  
18 have been different had the juror in question been excused. Nor can such be  
19 inferred on the facts presented.

20 It remains uncertain whether the juror in question was biased against  
21 Defendant. The Court of Appeals on the direct appeal found the evidence of bias  
22 weak. The juror never stated she could not be fair and impartial in deciding the  
23 case. This Court considers whether the failure to challenge the juror might have  
24 constituted trial strategy or even invited error. Defendant has failed to overcome  
25 the strong presumption that counsel's conduct fell within the broad range of  
26 reasonable professional assistance. However, the fact that Defendant cannot  
27 show the result of the case would have been different is sufficient to reject this  
28 ground for the motion.

1 Finally, Defendant alleges that his appellate counsel did not provide  
2 Constitutionally effective counsel because he failed to raise the Appendi error  
3 on appeal.

4 The drug in this case was cocaine base and hence the enhanced sentence  
5 would apply. There was no Appendi error. Defendant is unable to demonstrate  
6 that he was prejudiced by appellate counsel's failing to raise this issue on direct  
7 appeal or that there is a reasonable probability that, but for counsel's professional  
8 error, the result of the proceeding would have been different.

9 IT IS THEREFORE ORDERED that Defendant's motion filed on January  
10 24, 2011 (#199) pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct  
11 sentence is DENIED.

12 The Clerk shall enter judgment accordingly.

13 DATED this 13<sup>th</sup> day of July 2011.

14   
15 \_\_\_\_\_  
16 U.S. DISTRICT JUDGE  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28